84-348 (1)

NO. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

W. L. BALLARD

Petitioner

v.

PAUL BLOUNT, individually and In His Official Capacity as Head, Department of English Georgia State University, CLYDE FAULKNER, Individually and In His Official Capacity as Dean, College of Arts and Sciences, Georgia State University; and GLENN G. THOMAS, Individually and In His Former Capacity as Dean, College of Arts and Sciences, Georgia State University

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Julian Huguenin Henry
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P.O. Box 808
Athens, Georgia 30603
404/546-1395

THE QUESTION PRESENTED FOR REVIEW

Whether a college professor's comments upon academic policy is "protected" speech under the First Amendment to the United States Constitution.

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JURISDICTIONAL STATEMENT

This petition seeks review of the judgment of the United States Court of Appeals for the Eleventh Circuit in W. L. Ballard v. Paul Blount, et al., Case No. 84-8041, entered May 22, 1984. Jurisdiction is conferred upon this Court to review this judgment by writ of certiorari by 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH CASE INVOLVES

First Amendment to United States Consitution:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities

secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This action was commenced by the filing of a Complaint under the authority of 42 U.S.C. § 1983.

By order of December 12, 1983, the District Court granted defendants' motion for summary judgment and entered judgment in favor of the defendants and against the plaintiff. That judgment was summarily affirmed by Eleventh Circuit Court of Appeals on May 22, 1984.

The order granting summary judgment concluded, inter alia, that plaintiff's speech was unprotected because not relating to matters of "public" concern under the authority of Connick v. Meyers, ___ U.S. ___, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983).

Although summary judgment was also granted on plaintiff's equal protection and due process claims, appellate review has been limited to the First Amendment claim.

Plaintiff was at all relevant times an Associate Professor of English, Georgia State University. Defendant Blount was the head of the English Department and was plaintiff's immediate supervisor. Defendants Thomas and Faulkner were deans of the College of Arts and Sciences and supervisors of the plaintiff. Georgia State University is a public tax supported educational institution administered by the Board of Regents of the University of Georgia. The Board of Regents is an autonomous state agency. It's members are appointed by the Governor for a fixed term.

The express policy of the Georgia State University English Department, as articulated by the defendant Blount, was to encourage the faculty to offer fair criticism and constructive suggestions regarding academic policy

so as to develop a broad base upon which to establish and implement such policy. Consistent with this policy plaintiff, in a uniformly professional and polite manner, engaged in the following communicative activity which the courts below have found to be "unprotected".

A.
THE FRESHMAN ENGLISH SYLLABUS DEBATE

The earliest events reflected in the record arose from the faculty debate over a proposed freshman syllabus in academic year 1976-77. On September 15, 1976, plaintiff prepared a detailed memorandum to the Advisory Council of the Department of English containing certain criticisms and suggestions relating to a proposed new freshmen syllabus. This memorandum predicted academic problems which such a prescribed syllabus would cause

teaching faculty members. Among other things, it also suggested that the proposed syllabus would devalue the research and writing functions of the freshman English course. The tone of the memorandum was professional and polite. This memorandum was presented to the defendant Blount to be forwarded to the members of the Advisory Council of the English Department.

Although the defendant Blount advised plaintiff in writing that he would forward the September 15, 1976 memorandum to both the Freshmen Committee and to the Advisory Council, he has no recollection of doing so, and the memorandum was never, in fact, sent to the Advisory Council. Therefore, plaintiff prepared a memorandum on the topic addressed to the entire faculty of the Department of English. This memorandum objected to certain

procedural irregularities in the processing of the syllabus proposal and elaborated upon the substantive problems which it created. Both this memorandum and its predecessor articulated genuine academic concerns about the proper subject matter to be taught to freshmen students in this public university.

Although the defendant Blount objected to the latter memorandum being circulated to the whole faculty before being exhibited to him and the study committee, he testified that he had no objections to its contents or to the communication of the ideas contained in it. Indeed many of plaintiff's ideas respecting the various issues raised by the proposed syllabus were shared by other faculty members, and his position was ultimately vindicated when the faculty rejected the proposed

syllabus. Thereafter, the legitimate concerns of plaintiff and others were addressed and a new syllabus was adopted.

B.
FRESHMAN AND SOPHOMORE ENGLISH TEACHING ASSIGNMENTS

A second series of events commenced in June of 1977. At that time, plaintiff wrote a letter to the defendant Blount expressing his concerns over the pattern of teaching assignments to freshman and sophomore courses. This letter, dated June 30, 1977, developed a reasoned argument against the continuation of a de facto system under which senior faculty members were regularly assigned graduate and upper division courses, while junior faculty members and graduate teaching assistants were typically assigned freshman and sophomore classes.

A review of this letter is instructive in that it primarily concerned plaintiff's view that reform of the pattern of assignments would have a positive impact upon the morale of the entire faculty (senior and junior) and upon the program as a whole. The letter did not address any objection by plaintiff to his individual teaching assignments. Moreover, it made positive and concrete suggestions regarding proposed departmental policy which would encourage a more even distribution of these assignments. The letter was polite and professional in tone and offered plaintiff's continuing cooperation with and esteem for the defendant Blount. The matters addressed in this letter were also discussed by plaintiff with the Advisory Council.

C.

DEPARTMENTAL NEEDS

On July 29, 1977, plaintiff, speaking as a colleague of Tina Sizemore, an applicant for promotion and tenure, addressed a letter to the chairman of the Dean's Advisory Committee on Promotion and Tenure in support of her application. Plaintiff later learned that Ms. Sizemore had been dismissed despite an apparently favorable recommendation on her application by the Promotion and Tenure Committee. Therefore, plaintiff addressed a succinct letter, dated February 6, 1978, to defendant Blount complaining about Sizemore's dismissal specifically because of the negative impact which that decision would have upon the department's ability to address its needs respecting the teaching of freshman composition. To support his

argument, plaintiff enclosed a New York Times article bemoaning the contemporary de-emphasis on teaching writing skills in educational institutions.

As a result of this letter, plaintiff was called into a meeting with the defendants Blount and Thomas where he was sharply criticized for his attitude. In response to this criticism, plaintiff addressed correspondence dated February 13, 1978, carefully delineating his views regarding departmental personnel needs, particularly with respect to the ability of the department to deliver services in the vital area of freshman composition courses. This letter was an intelligent assessment of the future needs of the department with specific recommendations regarding personnel who could address those needs.

Subsequently, on January 30, 1979, plaintiff again addressed the personnel needs of the department vis-a-vis freshman composition in a letter to Eli Zubay, Vice President for Academic Affairs, supporting tenure applications of two other colleagues.

These events had no adverse impact upon the working relationship between the plaintiff and his superiors. His immediate superior, the defendant Blount, specifically welcomed criticism and constructive suggestions from the plaintiff and denied taking any action against plaintiff for criticizing him or departmental policy.

ARGUMENT

The District Court's order which was adopted by the Eleventh Circuit Court of Appeals decides an important question of federal law in a manner inconsistent with applicable decisions

of this Court and in conflict with a decision on the same issue by the Eight Circuit Court of Appeals. See McGee v. South Pemiscot School Dist. R-V 712 F.2d 339 (8th Cir. 1983):

In essence, the District Court's order construed Connick v. Meyers, 461 U.S. ____ (1983) as a broad mandate which, as applied to the facts here, renders teacher speech on internal college matters "unprotected".

This broad and conclusory application of Connick to the dissimilar facts and circumstances of this case ignores the expressed caveat of the Connick majority:

> We reiterate, however, the caveat we expressed in Pickering, supra, at 569: "Because of the enormous variety of fact situations in which critical statements by... public employees may be thought by their superiors... to furnish grounds for dismissal, we do not deem it either appropriate or feasible to lay down a general standard

against which all such statements may be judged."

A post-Connick Fifth Circuit Court of Appeals decision, Gonzalez v. Benavides, 712 F.2d 142 (5th Cir. 1983), contains an excellent discussion of Connick's contribution to the Pickering[1] calculus and underscores the significance of its caveat. The Court discusses Pickering and its progeny and concludes with the following succinct summary at page 146:

> Thus, the Pickering line socratically accommodated four concerns: first, whether the working relationship between the employer and employee was of such a personal and intimate nature that any public criticism would seriously undermine the effectiveness of the working relationship; second whether the statements were true, false or made with reckless disregard for the truth; third, whether

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[1] Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

> the statements undermined the general effectiveness of the work group; and fourth, whether the statements were only critical of policy.

The Court emphasizes in a footnote to this language that it has "consistently treated intimacy of working relationship as the fulcrum of the Pickering balance." Gonzalez, p. 146 n.1.

Gonzalez further recognizes that Connick's significance lay more in its admonition to avoid mechanical formulae than in its discussion of the particularized reasons for finding the complainant's speech there to be of "personal interest" only. The Court explained in the following language at page 147:

> Indeed, the common conceptual strand to much of our First Amendment jurisprudence is context, time, place, and manner. Implicit in this emphasis is that jealous protection of speech rights abjures mechanical response. Connick's relevant contribution to Pickering is

> essentially incremental. First Amendment issues presented by speaking employees are not answerable by mechanical formulae; courts must engage in a weighing exercise, giving "full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public" Id. at ----, 103 S.Ct. at 1692.

Several post-Connick circuit court decisions recognize that the mere fact that speech relates to the internal operation of a public employee's agency does not remove it from the ambit of "public" concern. For instance, a mechanic's criticism of policies and procedures adopted by his employer respecting county motor vehicle operations was "protected" by the Court in Czurlanis v. Albanese, 721 F.2d 98 (3d Cir. 1983).

Another post-Connick decision, McGee v. South Pemiscot School Dist. R-V, 712 F.2d 339 (8th Cir. 1983)

illustrates Connick's inapplicability to a teacher's speech on a matter of public concern which could have a direct impact on the teacher's conditions of employment. There, a track coaches' public opposition to a school board decision to discontinue junior high school track which he coached was found to be protected speech. The plaintiff's public letter discussing the issue contradicted three of six board members' statements that he had recommended discontinuation of the junior high track program. Nevertheless, the Court's Pickering analysis led it to conclude that the speech was protected. The Court distinguished Connick because of the absence in its record of adverse impact upon the teacher's ability to function and upon operation of the school. McGee, p. 342, n.4

Thus, available authority teaches that a proper assessment of the "protectability" of a plaintiff's speech in each case must be determined as an independent matter of law by reference to the content, form, and context of the statements as revealed by the whole record. Moreover, while the effect upon working relationships is a part of the Pickering equation, Connick does not hold that a teacher's speech on educational matters is not protected as suggested by the District Court.[2]

In considering the context of plaintiff's speech here, as juxtaposed to the facts in Connick, it is

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[2] Indeed at least one post-Connick decision has protected legitimate teacher speech on educational matters which completely destroyed the working relationship between the plaintiffs and their supervisors. Bowmann v. Pulaski County Special School District, 723 F.2d 640 (8th Cir. 1983).

important to focus upon the nature of the University system in Georgia. Unlike the district attorney's office under consideration in Connick, a public university in Georgia is not administered by elected officials who are ultimately accountable to the electorate. Nor are University officials accountable to an elected adversarial body such as public utility companies which enjoy state sanctioned monopolies. Rather public universities in Georgia are administered by an appointive Board of Regents. Its members enjoy fixed tenure. It is expressly designed to be removed from the political process. Nevertheless, the system is tax supported.

Because of its traditional autonomy, the public's legitimate interest in access to information concerning the system would be severely

compromised should those possessed of relevant information be muzzled. Indeed, the Pickering Court recognized the unique importance of allowing teachers to speak on matters concerning the operation of public schools. The Court noted at Pickering, page 572:

> Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allocated to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such matters without fear of retaliatory dismisal.

Thus, it is apparent that an important function of the First Amendment's guarantee of free speech is to preserve public access to information concerning governmental operations; particularly regarding government institutions which are insulated from more traditional means of public accountability.

The record sub judice reveals a teacher plaintiff who engaged in an intelligent and articulate debate concerning a proposed freshman English syllabus to be prescribed for all faculty members of the English Department of a state supported university. It also shows a plaintiff who objected to a pattern of teaching assignments which resulted in a disproportionate allocation of experienced and talented teachers to upper level courses to the detriment of an important lower level composition course. The plaintiff simply offered a fair argument in support of allocating teaching resources to an essential component of the teaching mission of this public university. Finally, plaintiff offered his candid comments respecting his professional peers' abilities to address departmental needs; a prerogative

traditionally reserved to tenured college professors.

Each of these matters concerned an issue of political, social or other concern to the public. In each instance, the central theme of the speech related to educational de-evaluation of lower level composition courses. Indeed the argument against the contemporary deemphasis on the teaching of writing skills was a matter of interest in the public arena as evidenced by the New York Times article discussing this issue.[3]

The subject matter of this speech was not tied, as in Connick, to a personal employment dispute between

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[3]Of course, plaintiff's decision to limit his speech to non-public forums is irrelevant if the content of that speech was a matter of general concern. Givhan v. Western Line Consolidated School District 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979).

plaintiff and his superiors.[4] Indeed, the subject matter of the speech in issue here is closely akin to the subject matter found to be protected in Pickering v. Board of Education, supra (allocation of school funds); Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) (whether a two year college should be elevated to four year status); Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 150 L.Ed.2d 471 (1977) (teacher dress and appearance). In each of those cases, the subject matter of the debate could ultimately affect the plaintiff's conditions of employment. This consideration does not render "protected"

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[4]Plaintiff's claim that he suffered retaliation in the form of unjust pay raises, abolition of the linguistics program, and alteration of other conditions of employment is unrelated to the subject matter of his speech. Thus the District Court's emphasis upon the remedy sought by plaintiff here and in his internal grievance is not apropos.

speech "unprotected" under any fair construction of Connick. Contrary to the district court's conclusions in this case, Connick contains no litmus test prohibiting speech upon matters of public concern which may have some derivative impact upon the speaker's conditions of employment. The District Court erroneously equates matters of internal college affairs with non-public issues. This conclusion is not supported in law since a fundamental tenet of First Amendment jurisprudence is the protection of speech about the". . . manner in which government is operated or should be operated . . ." Mills v. Alabama, 384 U.S. 214, 218, 86 S.Ct. 1434, 16 L.Ed.2d 484 (1966).

In view of these considerations, the Connick majority's narrow statement of its holding is understandable:

> We hold only that when a public employee speaks not as a citizen upon matters of public

> concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate form in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. [emphasis added]

Finally, and of determinative significance to the resolution of this issue, it is important to note the total absence of disharmony between this plaintiff and his immediate supervisor as a result of his speech.

Here, unlike the facts in Connick, no act or speech of the plaintiff's was considered "an act of insubordination by his superiors" or a "mini-insurrection". On the contrary, his comments regarding academic policy were encouraged as a normal function of teachers within the academic atmosphere in which they were offered. Nor did this plaintiff ever express a lack of

confidence in or question the integrity of his superiors as did the plaintiff in Connick. Indeed, it appears that the District Court misconstrued the essential thrust of Connick's contribution to the Pickering equation through its failure to consider the absence of any adverse impact upon the efficiency of the public services being performed by Georgia State University.

Absent such effect, it is abundantly apparent that plaintiff's speech, judged by its content, form, and context, is protected. See e.g. Patterson v. Johnson, 721 F.2d 228 (8th Cir. 1983).

In sum, plaintiff's speech and conduct concerning academic matters is a function of the academic freedom implicit in the concept of tenure, the purpose of which is to insure freedom

of thought in academic institutions. Before impairing this valuable benefit, the courts should be mindful of the observation of the Supereme Court in Keyishian v. Board of Regents of New York, 385 U.S. 589, 603, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967):

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom, is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." Shelton v. Tucker, supra, 364 U.S. at 487. The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection." United States v. Associated Press, 52 F.Supp. 362, 372. In Sweezy

v. New Hampshire, 354 U.S. 234, 250, we said:

> "The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."

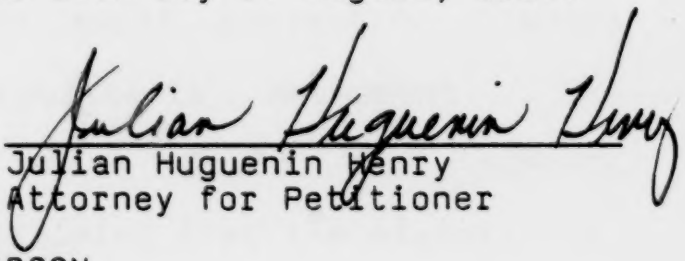
For all of these reasons, it is apparent that the District Court erred in concluding that comment upon internal college matters is beyond the pale of First Amendment protection.

Therefore, the summary affirmance of this judgment by the Eleventh Circuit Court of Appeals should be reversed and the case should be remanded with appropriate directions.

CERTIFICATE OF SERVICE

I certify that I have this date served the Respondents with the foregoing Petition for Certiorari by placing three (3) printed copies thereof in the United States mail with proper first class postage affixed thereto and addressed to their attorney, Alfred L. Evans, Jr., Senior Assistant Attorney General, State of Georgia, 132 State Judicial Building, Atlanta, Georgia 30334.

This 14th day of August, 1984.



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APPENDIX

1. Opinion of Uniteid States District Court for the Northern District of Georgia.
2. Judgment of United States Court of Appeals for the Eleventh Circuit.

IN THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT
OF GEORGIA
ATLANTA DIVISION

W. L. BALLARD, :

Plaintiff, : CIVIL ACTION

vs. : No. C81-2238 A

PAUL BLONT, et al., :

Defendants. :

O R D E R

In this 42 U.S.C. § 1983 action, the plaintiff, a tenured professor at Georgia State University, alleges that he was retaliated against for conduct protected by the First and Fourteenth Amendments. In addition, he alleges that he was not awarded salary increases to which he was entitled and that this action violated the due process and equal protection clauses of the Fourteenth Amendment. The defendants have moved for summary judgment, claiming that the plaintiff's alleged speech was not protected because it did not relate to matters

of "public concern" and that their pay raise system did not violated the plaintiff's due process and equal protection rights.

I. BACKGROUND

The plaintiff, Dr. William Lewis Ballard, was hired as an assistant professor of English at Georgia State University in 1969, and shortly thereafter he began developing a linguistics program in the English department. In 1973 he was promoted to associate professor of English and was awarded tenure. He continued teaching only linguistics courses until 1979. From the inception of the linguistics program in 1969 until its ultimate dissolution in 1980, it is uncontroverted that the linguistics program was plagued by consistently low student interest. The defendants contend that the lack of student interest was the motivating factor in

the decision to dissolve the program.

Shortly before the dissolution of the linguistics program, but at the time when enrollment in the linguistics courses was extremely low, defendant Dr. Blount, Chairman of the English department and Dr. Ballard's immediate supervisor, informed Dr. Ballard that he (Dr. Ballard) would have to teach traditional English courses rather than the linguistics courses which he had previously taught. Dr. Ballard chose teaching a freshman-level English class, and he began teaching this class in the fall of 1979. He continued teaching in the English department until September 1981, at which time he was transferred to the College of Public and Urban Affairs. Shortly thereafter, in December 1981, Dr. Ballard instituted this suit.

In his complaint Dr. Ballard alleges that he has received less than the average annual salary increases

for the academic years 1976-77 through 1981-82. He claims that these less-than-average salary increases were retaliatory actions designed to punish him for the exercise of rights secured by the First and Fourteenth Amendments. Dr. Ballard also claims that the defendants retaliated against him in a variety of other ways, including: cancelling the entire linguistics program, failing to appoint him to faculty committees, denying him equal release time (pay without duties), and failing to assign him to appropriate summer teaching duties[1].

After reviewing Dr. Ballard's complaint and deposition, this Court

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[1] These last three claims are dubious, since Dr. Ballard conceded in his deposition that he never sought to be appointed to any faculty committee, that he did receive release time, and that he never objected to the summer teaching duties to which he was assigned. Ballard Deposition at 9, 42-45.

has identified four separate communicative and associative activities for which Dr. Ballard claims he was retaliated against. These claims may be summarized as follows:

> (1) A letter he wrote objecting to the joint decision of Dr. Blount and the Department Tenure Committee which recommended denying tenure to a colleague of Dr. Ballard. Ballard Deposition at 27.
>
> (2) Dr. Ballard's challenges to the manner in which he and other colleagues were assigned to teach freshman-level English courses. Ballard Deposition at 19.
>
> (3) Dr. Ballard's claim that he was further retaliated against when he unsuccessfully challenged through an internal administrative grievance procedure the defendants' decision to award him less-than-average annual salary increases. Complaint ¶ 25.
>
> (4) Dr. Ballard's challenges to a proposed freshman English syllabus which restricted a teacher's latitude in conducting the class. Ballard Deposition at 18.

In addition to claiming that his less-than-average salary increases were in retaliation for protected First Amendment activity, Dr. Ballard claims that these salary increases denied him equal protection and due process. Complaint ¶¶ 23, 24.

II. DISCUSSION

Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment bears an exacting burden of establishing that there is no dispute regarding any material fact in the case. Warrior Tombigbee Transportation Co. v. M/V Nan Fung, 695 F.2d 1294, 1296 (11th Cir. 1983). And all reasonable doubts about the facts should be resolved in favor of the non-movant. Clemmons v. Doughterty County, Georgia, 684 F.2d 1365, 1369 (11th Cir. 1982).

A. The First Amendment Claim

The threshold inquiry in this case is whether Dr. Ballard's speech involved matters of "public concern," rather than matters relating merely to Dr. Ballard's personal interest. Speech involving the former is protected, whereas speech involving the latter is not. Connick v. Meyers, ___ U.S. ____, ____, 103 S. Ct. 1684, 1690 (1983). If the employee's speech cannot be characterized fairly as constituting speech on a matter of public concern, it is unnecessary for the court to scrutinize the reasons for the employee's alleged reprimand. Id. at 1689. Whether Dr. Ballard's speech involved a matter of public concern is to be determined by the content, form, and context of a given statement as revealed by the whole record. Id. at 1690. Additionally, the question relating to the protected

status of speech is one of law; thus it is an appropriate issue to be resolved on a motion for summary judgment. Id.; Mahaffey v. Kansas Board of Regents, 562 F. Supp. 887, 888, 890 (D. Kan. 1983).

In Connick v. Myers, the Supreme Court interpreted Pickering v. Board of Education, 391 U.S. 563, 88 S. Ct. 1731 (1968), and its progeny and attempted to strike a balance between the interest of the employee, as a citizen, in commenting on matters of public concern, and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees. The specific question framed by the Connick Court was "whether the First and Fourteenth Amendments prevent the discharge of a state employee for circulating a questionnaire concerning internal office affairs." 103 S. Ct. at 1686 (emphasis added). The state

argued that since the employee's questionnaire concerned matters relating only to internal office affairs, this speech ws not protected because, by definition, it did not relate to a matter of public concern. The Court agreed, reasoning that employee expression which does not relate to any matter of political, social, or other community concern is a personal, rather than a public, expression. Id. at 1680. Additionally, the Court recognized that

> government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for dismissal are alleged to be mistaken or unreasonable.

Id

The Connick Court's public versus private distinction reflects the common-sense realization that government offices could not function if every employment decision became a constitutional matter. The Court rejected the proposition that all matters which transpire within a government office are of public concern, since this would mean that every remark or criticism directed against a public official would plant the seed of a consitutional case. Id. at 1691. Indeed, if a faculty member need only point to some verbal criticism or altercation concerning his college, its curriculum, or how things are run in order to convert an adverse personnel decision into a federal action, then nearly every adverse personnel decision could be reviewable by a federal court under 42 U.S.C. § 1983.

The Court also noted that "the First Amendment does not require a public office to be run as a round-table for employee complaints over internal office affairs." Id. at 1691 (emphasis added). Finally, the Court recognized that even in those situations where the employee's speech has a limited impact on matters of public concern, it will not necessarily fall within the protection of the First and Fourteenth Amendments. Id. at 1693-94. In sum, the Court held

> [W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Id. at 1690.

The Connick decision was applied in a case remarkably similar to this

case. In Mahaffy v. Kansas Board of Regents, 562 F. Supp. 887 (D. Kan. 1983), a tenured professor claimed that he was punished for expressing opinions protected by the First and Fourteenth Amendments. The plaintiff's assertedly protected speech activities concerned matters such as his individual salary increases, his position on the college organizationalchart, policy decisions concerning internal departmental affairs, and the identity of his superiors. The Court characterized the discussion of these matters as quintessential items of individual, rather than public, concern. Further, the Court noted that "the Connick [C]ourt made it plain that an individual cannot bootstrap his individual grievance into a matter of public concern either by bruiting his complaint to the world or by invoking a supposed popular interest in the way

public institutions are run." Id. at 890. Accordingly, the Court rejected the plaintiff's claim that this speech was protected by the First and Fourteenth Amendments. See also Leonard v. City of Columbus, 705 F.2d 1299, 1305 (11th Cir. 1983) (interpreting Connick as providing less protection to complaints concerning purely internal office affairs than to those concerning matters of "public concern").

In applying the Connick test to Dr. Ballard's assertedly protected First Amendment activity, see supra p. 3, this Court finds that Dr. Ballard's speech did not relate to matters of public concern and thus was unprotected. For example, the subject matter of Dr. Ballard's grivance which he pursued through the university's grievance procedure concerned his salary increases. An individual's

salary is an issue personal to the individual and has no relationship to matters of public concern. Similarly, Dr. Ballard's challenges to the manner in which he and his colleagues were assigned to teach the freshman English courses was a matter of private concern. The particular courses an individual is assigned to teach simply cannot be viewed as a matter in which the public has a legitimate interest. Accordingly, expression relating to this challenge simply does not rise to a matter of public concern.

The remaining two speech activities for which Dr. Ballard claims he was retaliated against also did not involve matters of public concern. Dr. Ballard's deposition makes it unmistakably clear that these challenges involve matters relating to internal college affairs rather than to matters of political or social import--matters

of public concern.[2]

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[2] In pertinent part Dr. Ballard's Depostion reads as follows:

Q: What [allegedly protected] criticisms did you make that you feel are a basis of this action?

A. There were two or three that stand out in my mind that are particularly significant, but there were a number of minor ones all along. Some of the major ones had to do with the development over a period of years with regards to the freshman English syllabus adoption, new syllabus adoption, and there were the events that had to do with the letter I wrote to Dr. Blount on Tina Sizemore's decision or decision about Tina Sizemore.

Then there was a specific time when I -- again, a sequence of events, but a particular event when I talked to the advisory council about the policies of how teachers were assigned in the freshman program, who taught it and under what conditions and so forth.

As I say, there were a number of things, all complex in themselves, and there were other actions as well, other times as well.

Q. Basically, could you summarize and say that these are all to your perception constructive criticism of department policies in the functioning of the English department?

The first speech activity concerned a proposed freshman English syllabus. In defendant Dr. Blount's deposition he recalled that during the faculty discussion of the proposed syllabus two general challenges were raised regarding this issue, and Dr. Ballard was one of several faculty members discussing these challenges. Blount Deposition at 15-19, 29.[3] The first challenge concerned the prescriptive nature of the syllabus; the syllabus opponents claimed that the syllabus was too rigid and that it removed the flexibility with which the teachers

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A. Yes.
Q. As opposed to positions on matters of public or political issues or things of that sort?
A. Yes.
Ballard Deposition at 19-20.

[3] Dr. Blount's statements relating to the proposed English syllabus have neither been challenged nor contradicted by the plaintiff and therefore will be accepted as true.

were accustomed to. Id. at 15. The second challenge concerned the procedures employed to review and approve the proposed syllabus. Apparently, one committee entrusted with the duty of initially reviewing such proposals had not been consulted. In any event, both of these challenges were addressed and resolved; the syllabus was eventually adopted, but only after it had gone through the correct administrative procedures and after the prescriptive tone of the syllabus was modified.

The plaintiff claims that this speech was related to a matter of public concern, since the decision regarding the syllabus would have an eventual, derivative effect on the freshman English students. Taken to its logical conclusion, the plaintiff's argument means that any time a person's speech will have an effect on the

public, regardless of how small or unlikely that effect may be, that speech relates to a matter of public concern. This was a specific concern of the Connick Court, and the Court wisely rejected this identical argument. Accordingly, this Court concludes that any speech relating to the discussion of the syllabus concerned matters of internal college affairs and did not relate to matters of public concern.

The final speech activity for which Dr. Ballard claims he was retaliated against concerned his objection to the administrative decision to deny tenure to a colleague, Tina Sizemore. For the reasons stated above, this Court concludes that absent unusual circumstances an administrative decision to grant or deny tenure to an individual is not a matter of public concern, and an individual challenging

this administrative decision is without First Amendment protection.

In sum, the Court concludes that the speeck for which Dr. Ballard alleges he was retaliated against for expressing, simply did not relate to matters of public concern and therefore is not protected.

B. The Due Process and Equal Protection Claims

In his remaining constitutional claims, Dr. Ballard asserts that the defendants' decision to award him less than the average annual salary increases violated his due process and equal protection rights. In Parratt v. Taylor, 451 U.S. 527, 101 S. Ct. 1908 (1981), the Supreme Court identified four prerequisites necessary to assert a violation of the due process clause. These prerequisites include

> (1) The conduct complained of must have been committed by a person acting under

color of state law;

(2) There must be a constitutionally protected property or liberty interest at issue;

(3) There must have been a deprivation of this protected interest; and

(4) The deprivation of this interest must have occurred without due process of law.

Id. at 535-37, 101 S. Ct. at 1913-14. Although it is undisputed that the first requirement is satisfied here, the Court finds that the remaining three requirements are not satisfied. In Doyle v. University of Alabama in Birmingham, 680, F.2d 1323 (11th Cir. 1982), the Eleventh Circuit rejected the argument that a university professor had a protected property or liberty interest in a merely recommended salary raise. The plaintiff's proposed salary increase was subsequently disapproved because of her perceived unsatisfactory

teaching performance. This Court finds that these expectations were not protected property or liberty interests for due process purposes.

In addition to failing to meet the second and third requirements of Parratt, Dr. Ballard also fails to meetthe final Parratt requirement--a showing that he was not afforded due process in connection with the decision to award him his less-than-average salary increases. Due process merely requires an opportunity for a hearing appropriate to the nature of the case, Muline v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313, 70 S. Ct. 652, 656-57 (1950), granted at a meaningful time and in a meaningful manner. Armstrong v. Manzo, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191 (1965). See also Clark v. Whiting, 607 F.2d 634, 655-45 (4th Cir. 1979) (the amount of due process required in a case where a

teacher alleges he was denied a promotion is far less than that necessary in a trial-type situation). Dr. Ballard appealed his salary grievance both within the English department and to a college-level grievance committee. At these hearings, Dr. Ballard appeared with counsel, was afforded the right to give testimony and present evidence, and was entitled to a determination based on the record. This Court finds Doyle dispositive of the second and third Parratt requirements. The merit salary increases at issue in this case were by definition discretionary, designed to serve as a reward for an acceptable teaching performance. There merit salary increases were, at best, expectations rather than entitlements, and this court finds that these hearings, and the procedural and substantive rights afforded herein, adequately afforded

Dr. Ballard his due process rights.[4] Clinging to the last straw, Dr. Ballard asserts that his less-than-average annual salary increases violated the Equal Protection Clause of the Fourteenth Amendment. In order to establish a violation of the Equal Protection Clause based upon the ad hoc action of state officials, a plaintiff must demonstrate that the action was prompted by some racial, or other class-based, invidiously discriminatory

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[4] Despite these procedural and substantive safeguards, Dr. Ballard was unsuccessful at both appellate levels. The appellate committees found numerous reasons supporting Dr. Ballard's limited salary increase, including the high attrition rate in Dr. Ballard's English courses, Dr. Ballard's incomplete and nonconstructive grading of student papers, and the numerous student complaints relating to Dr. Ballard's teaching performance. In sum, these appellate committees found defendant Dr. Blount's conclusion that Dr. Ballard was performing inadequately and did not deserve the salary increase to be reasonable.

animus. Griffin v. Breckenridge, 403 U.S. 88, 91 S. Ct. 1790 (1971). See also Mahaffey v. Kansas Board of Regents, 562 F. Supp. 887, 890. It is this burden that Dr. Ballard fails to satisfy. At the outset, the Court notes that Dr. Ballard does not allege that any other member of the English department faculty is similarly situated for equal protection purposes. Nor does he assert that he is a member of any traditional discrete class (e.g., race, sex, or age) that either was or may be subjected to invidious discrimination. Rather, he attempts to squeeze himself into a puntative class of all faculty membmers working under the merit pay raise system. This attempted classification does violence to the dictate of Griffin, since a relaxed classification would result in the very generalized federal tort law that the Supreme Court sought

to avoid in Griffin. See 403 U.S. at 102, 91 S. Ct. at 1798. Accordingly, this Court refuses to permit Dr. Ballard to prosecute his individualized grievance in the guise of the Equal Protection clause. Additionally, this Court finds that the merit pay system is constitutionally permissible, since it is substantially related to a legitimate and important objective of the university. See Stone v. Board of Regents of the University System of Georgia, 620 F. 2d 526, 529 n.8 (5th Cir. 1980).

III. SUMMARY

In summary, the Court **GRANTS** the defendants' motion for summary judgment.

SO ORDERED, this 12th day of December, 1983.

ROBERT L. VINING, JR.
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 84-8041
Non-Argument Calendar

W. L. BALLARD,

Plaintiff-Appellant,

versus

PAUL BLOUNT, et al.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN
DISTRICT OF GEORGIA

(May 22, 1984)

Before FAY, VANCE and KRAVITCH,
Circuit Judges

PER CURIAM:

AFFIRMED on the basis of the order of the Honorable Robert L. Vining, Jr., United States District Judge, December 12, 1983.